Supreme Court, U.S.
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SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NUMBER: 86-338

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

MRS. CHERRY BERRY, GENERAL GUARDIAN FOR THE USE AND BENEFIT OF SANDY BERRY, CHRISTY BERRY, AND AMANDA BERRY, MINORS and MRS. CHERRY BERRY, INDIVIDUALLY AND FOR THE USE AND BENEFIT OF ALL ENTITLED

(PETITIONERS)

VERSUS

THE AETNA CASUALTY AND SURETY COMPANY

(RESPONDANT)

Brief of Respondant Aetna Casualty and Surety Company in Opposition to Petition for Writ of Certiorari to the United States Supreme Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for Plaintiff:

Jim Bullock
Shell, Buford, Bufkin,
Callicutt & Perry
Post Office Box 157
Jackson, Mississippi 39205
Telephone: (601) 948-2291

41PP

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TABLE OF AUTHORITIES

Cases

1. Berry vs. Aetna Casualty and Surety Company, et al, 607 F. Supp. 397 (S. D. Miss., 1984). 1

2. Fuqua vs. Travelers Insurance Company, 734 F. 2D 616 (11th Cir. 1984). 6

3. Government Employees Insurance Company vs. Brown, 446 So. 2D 1002 (Miss. 1984) 7

4. Pittsburgh Towing Company vs. Mississippi Valley Barge Line Company, et al, 385 U.S. 32, 17 L ed 2nd 31, 87 S. Ct. 195, reh. den. 385 U.S. 995, 17 L ed 2nd 455, 87 S. Ct. 594 (U.S. 1966) 9

5. Singleton vs. Wulff, et al, 428 U.S. 106, 49 L Ed 2nd 826, 96 S. Ct. 2868 (U.S. 1976) 9

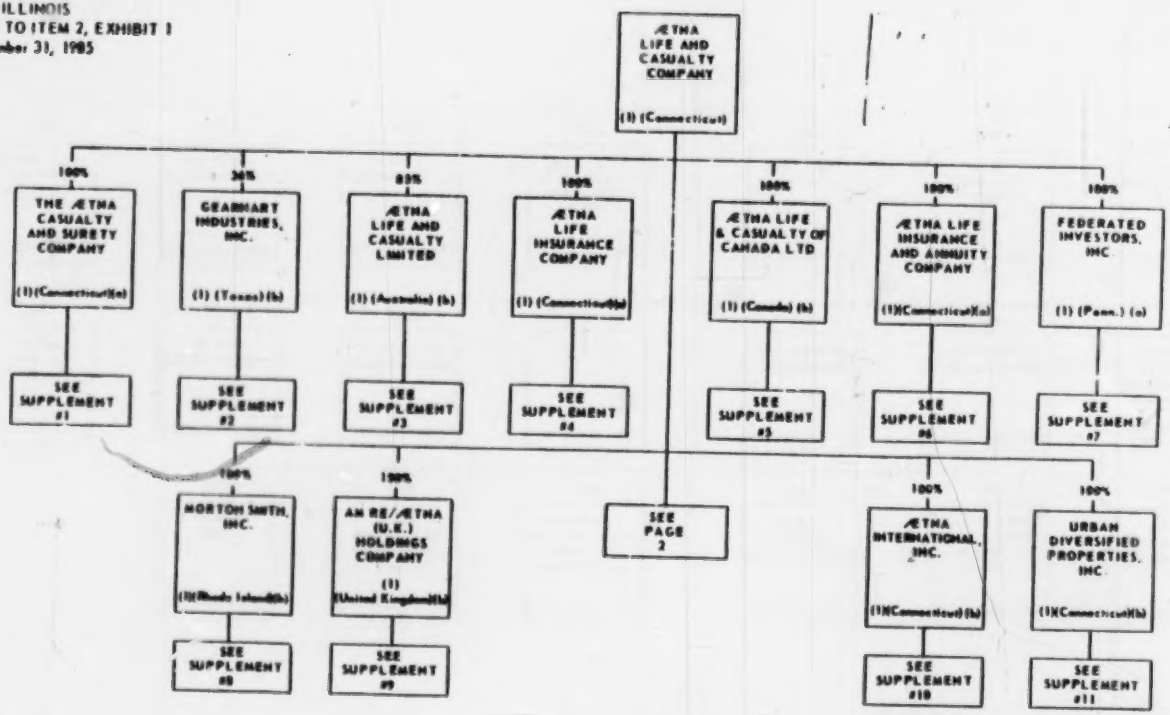
6. Youakim, et al vs. Miller, 425 U.S. 231, 47 L Ed 2nd 701, 96 S. Ct. 1399 (U.S. 1976) 9

7. Alabama Great Southern Railroad Company vs. Allied Chemical Corporation, et al, 501 F. 2d 94 (5th Cir. 1974) 9

TABLE OF CONTENTS

		Page
1.	Table of Authorities.....	i
2.	Table of Contents.....	ii
3.	Listing of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Respondant.....	iii
4.	Preliminary Statement.....	1
5.	Statement of the Case.....	2
6.	Question I.....	8
7.	Conclusion.....	10

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

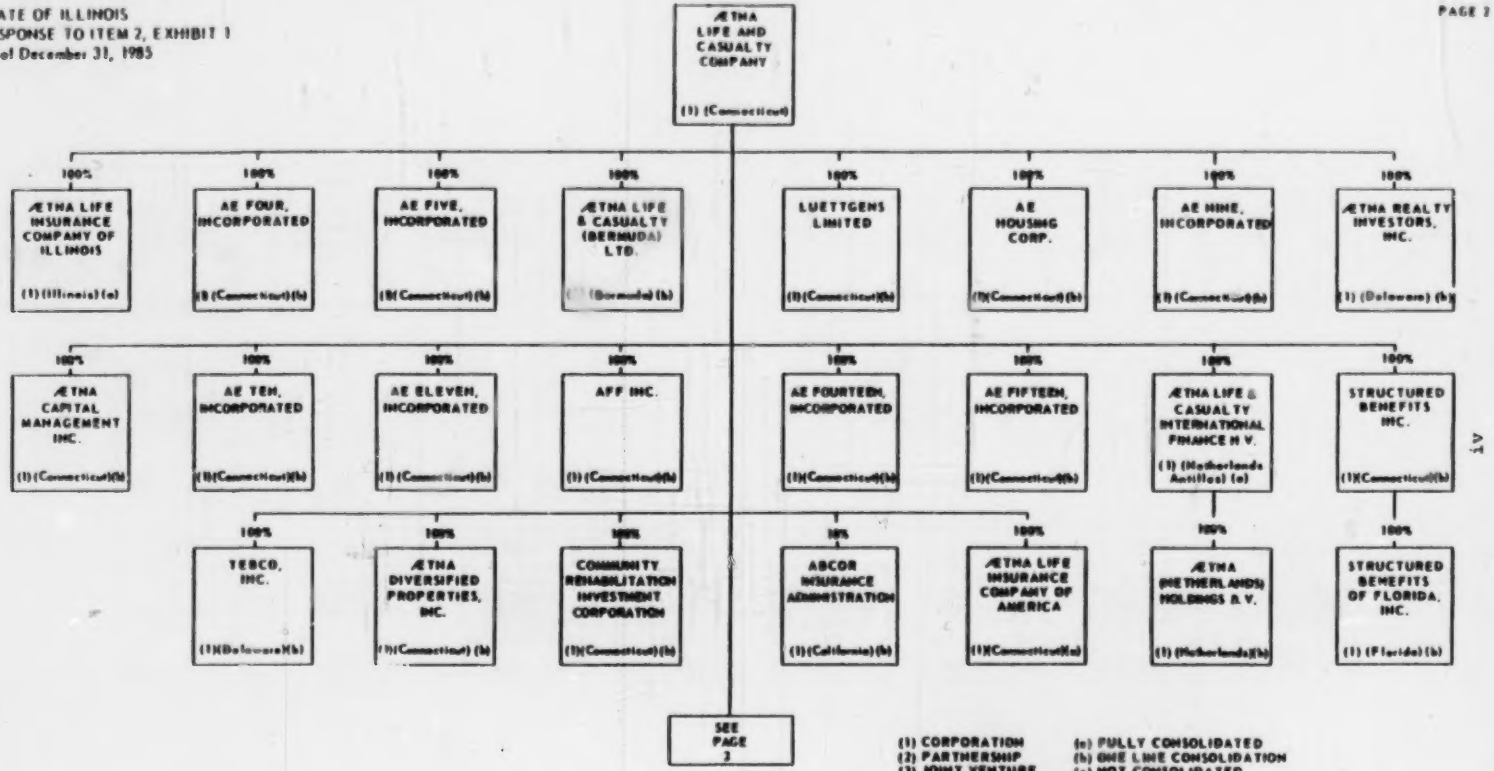


(1) CORPORATION
(2) PARTNERSHIP
(3) JOINT VENTURE
(4) LLOYDS ASSOCIATION
(5) TRUST

(a) FULLY CONSOLIDATED
(b) ONE LINE CONSOLIDATION
(c) NOT CONSOLIDATED

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985



(1) CORPORATION
(2) PARTNERSHIP
(3) JOINT VENTURE
(4) LLOYDS ASSOCIATION
(5) TRUST

(a) FULLY CONSOLIDATED
(b) ONE LINE CONSOLIDATION
(c) NOT CONSOLIDATED

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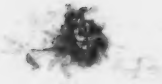
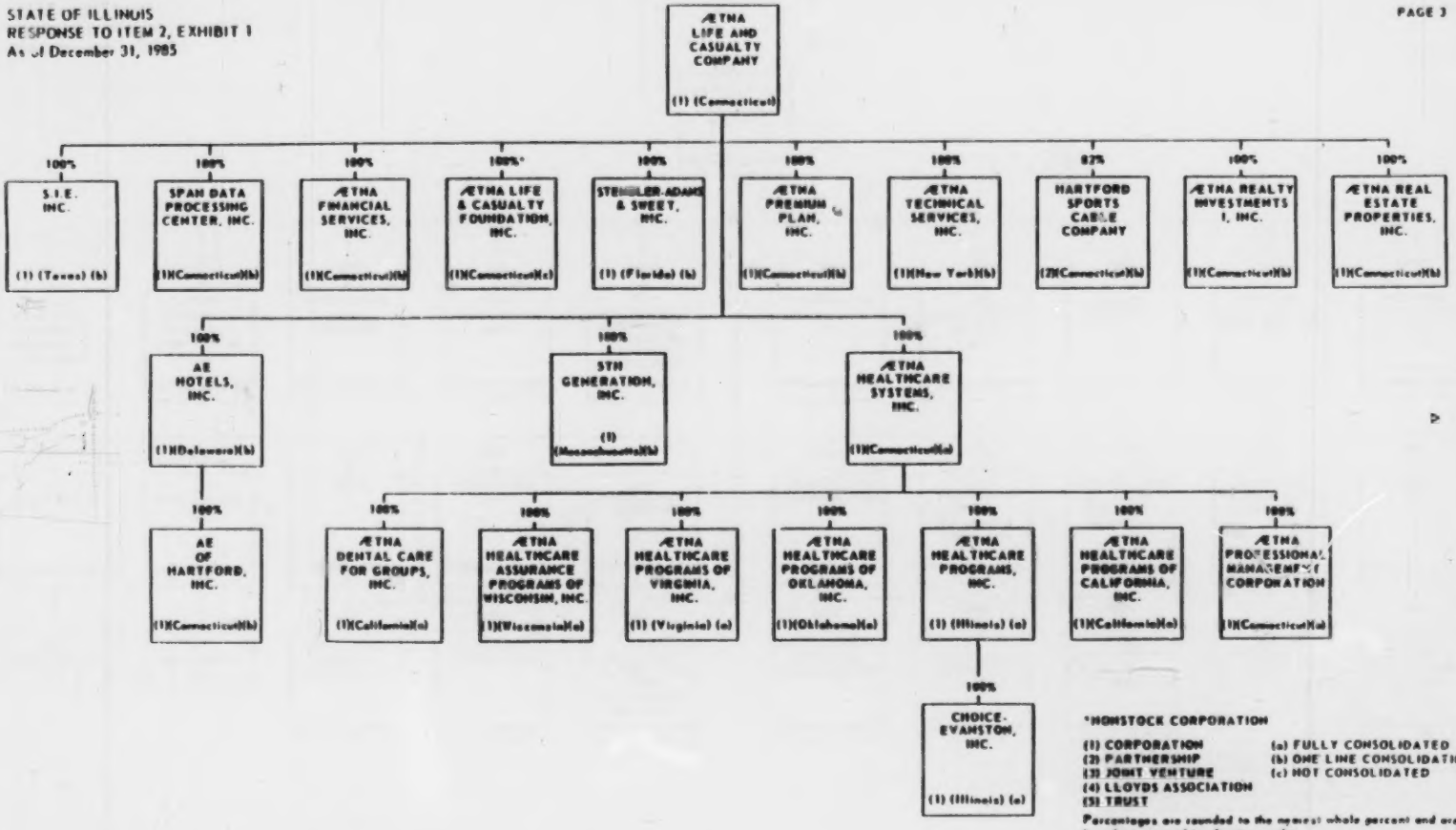


STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985


ÆTNA LIFE AND CASUALTY COMPANY
(1) (Connecticut)
100% S.I.E. INC. (1) (Texas) (b)
100% SPAN DATA PROCESSING CENTER, INC. (1)(Connecticut)(b)
100% ÆTNA FINANCIAL SERVICES, INC. (1)(Connecticut)(b)
100%* ÆTNA LIFE & CASUALTY FOUNDATION, INC. (1)(Connecticut)(c)
100% STEINGLER-ADAMS & SWEET, INC. (1) (Florida) (b)
100% ÆTNA PREMIUM PLAN, INC. (1)(Connecticut)(b)
100% ÆTNA TECHNICAL SERVICES, INC. (1)(New York)(b)
87% HARTFORD SPORTS CABLE COMPANY (2)(Connecticut)(b)
100% ÆTNA REALTY INVESTMENTS I, INC. (1)(Connecticut)(b)
100% ÆTNA REAL ESTATE PROPERTIES, INC. (1)(Connecticut)(b)
100% AE HOTELS, INC. (1)(Delaware)(b)
100% AE OF HARTFORD, INC. (1)(Connecticut)(b)
100% 5TH GENERATION, INC. (1) (Massachusetts)(b)
100% ÆTNA HEALTHCARE SYSTEMS, INC. (1)(Connecticut)(a)
100% ÆTNA DENTAL CARE FOR GROUPS, INC. (1)(California)(a)
100% ÆTNA HEALTHCARE ASSURANCE PROGRAMS OF WISCONSIN, INC. (1)(Wisconsin)(a)
100% ÆTNA HEALTHCARE PROGRAMS OF VIRGINIA, INC. (1) (Virginia) (a)
100% ÆTNA HEALTHCARE PROGRAMS OF OKLAHOMA, INC. (1)(Oklahoma)(a)
100% ÆTNA HEALTHCARE PROGRAMS, INC. (1) (Illinois) (a)
100% ÆTNA HEALTHCARE PROGRAMS OF CALIFORNIA, INC. (1)(California)(a)
100% ÆTNA PROFESSIONAL MANAGEMENT CORPORATION (1)(Connecticut)(a)
100% CHOICE-EVANSTON, INC. (1) (Illinois) (a)

*HOMSTOCK CORPORATION

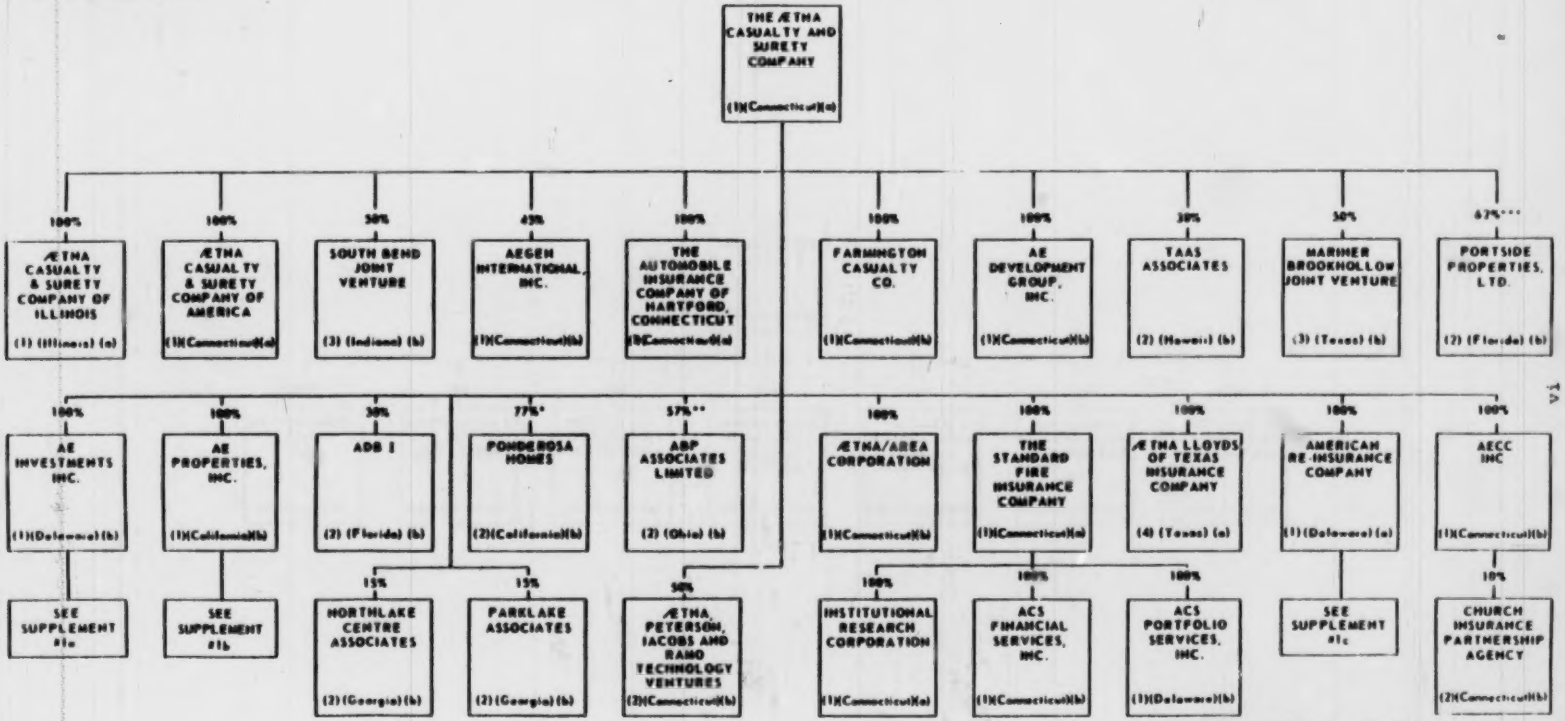
(1) CORPORATION
(2) PARTNERSHIP
(3) JOINT VENTURE
(4) LLOYDS ASSOCIATION
(5) TRUST

(a) FULLY CONSOLIDATED
(b) ONE LINE CONSOLIDATION
(c) NOT CONSOLIDATED

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #1

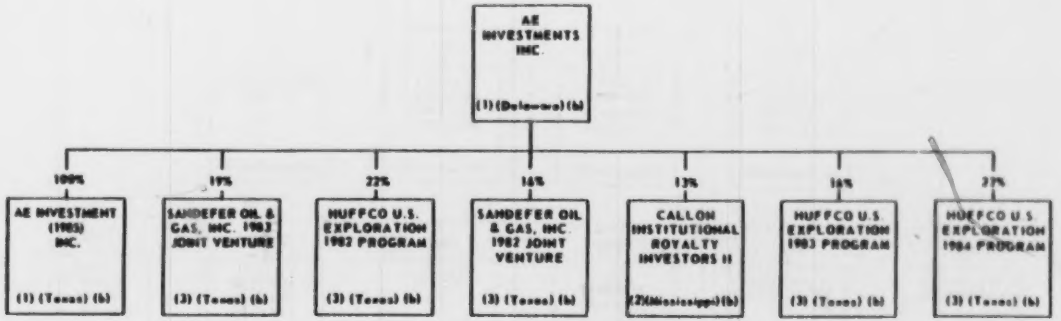

THE ÆTNA CASUALTY AND SURETY COMPANY
(1)(Connecticut)(a)
100% ÆTNA CASUALTY & SURETY COMPANY OF ILLINOIS (1) (Illinois) (a)
100% ÆTNA CASUALTY & SURETY COMPANY OF AMERICA (1)(Connecticut)(a)
50% SOUTH BEND JOINT VENTURE (3) (Indiana) (b)
45% AEGEN INTERNATIONAL, INC. (1)(Connecticut)(b)
100% THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT (1)(Connecticut)(a)
100% FARMINGTON CASUALTY CO. (1)(Connecticut)(b)
100% AE DEVELOPMENT GROUP, INC. (1)(Connecticut)(b)
38% TAAS ASSOCIATES (2) (Hawaii) (b)
50% MARINER BROOKHOLLOW JOINT VENTURE (3) (Texas) (b)
67%*** PORTSIDE PROPERTIES, LTD. (2) (Florida) (b)
100% AE INVESTMENTS INC. (1)(Delaware) (b)
100% AE PROPERTIES, INC. (1)(California)(b)
30% ADB I (2) (Florida) (b)
77%* PONDEROSA HOMES (2)(California)(b)
57%** ABP ASSOCIATES LIMITED (2) (Ohio) (b)
100% ÆTNA/AREA CORPORATION (1)(Connecticut)(b)
100% THE STANDARD FIRE INSURANCE COMPANY (1)(Connecticut)(a)
100% ÆTNA LLOYDS OF TEXAS INSURANCE COMPANY (4) (Texas) (a)
100% AMERICAN RE-INSURANCE COMPANY (1) (Delaware) (a)
100% AECC INC (1)(Connecticut)(b)
SEE SUPPLEMENT #1a
SEE SUPPLEMENT #1b
15% NORTHLAKE CENTRE ASSOCIATES (2) (Georgia) (b)
15% PARKLAKE ASSOCIATES (2) (Georgia) (b)
50% ÆTNA, PETERSON, JACOBS AND RAMO TECHNOLOGY VENTURES (2)(Connecticut)(b)
100% INSTITUTIONAL RESEARCH CORPORATION (1)(Connecticut)(a)
100% ACS FINANCIAL SERVICES, INC. (1)(Connecticut)(b)
100% ACS PORTFOLIO SERVICES, INC. (1)(Delaware)(b)
SEE SUPPLEMENT #1c
10% CHURCH INSURANCE PARTNERSHIP AGENCY (2)(Connecticut)(b)

*AE Development Group, Inc. is a 23% general partner.
**The Ætna Casualty and Surety Company is a 56% general partner and 1% limited partner.
***The Ætna Casualty and Surety Company is a 61% general partner and a 1% limited partner.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #1a



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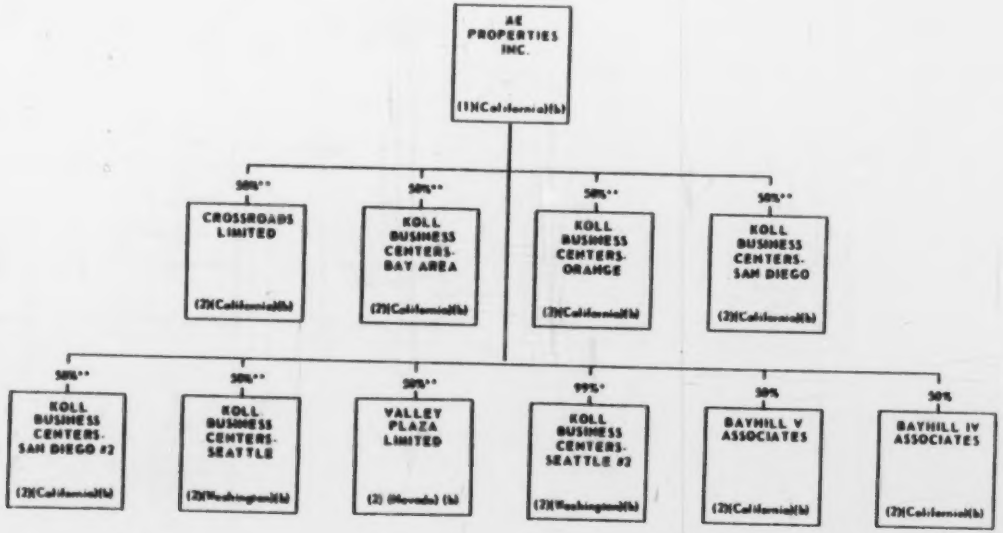
STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT I
As of December 31, 1985

Supplement #1b



*AE Properties, Inc. is a 98% general partner and a 1% limited partner. Aetna Life Insurance Co. is a 1% general partner.

**AE Properties, Inc. is a 49% general partner and a 1% limited partner.

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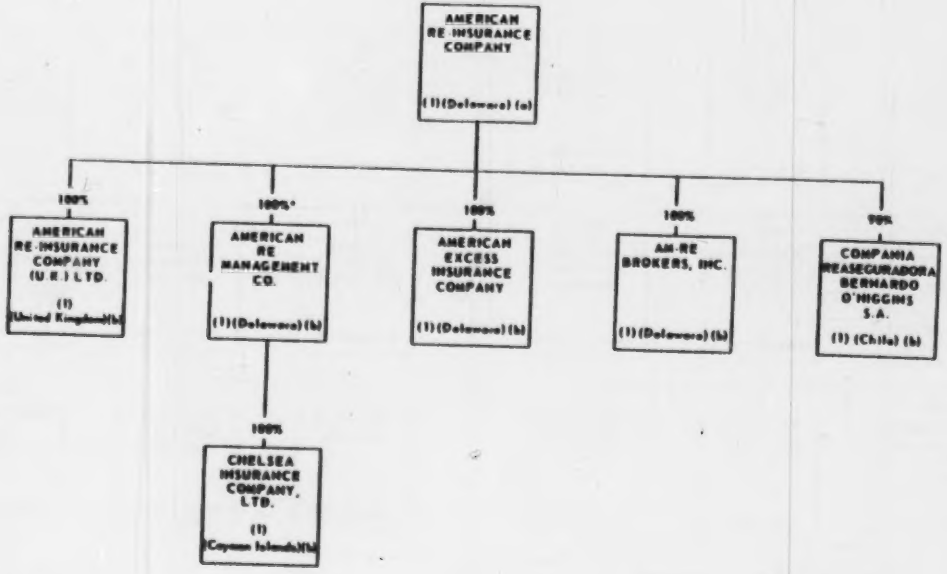
STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #1c

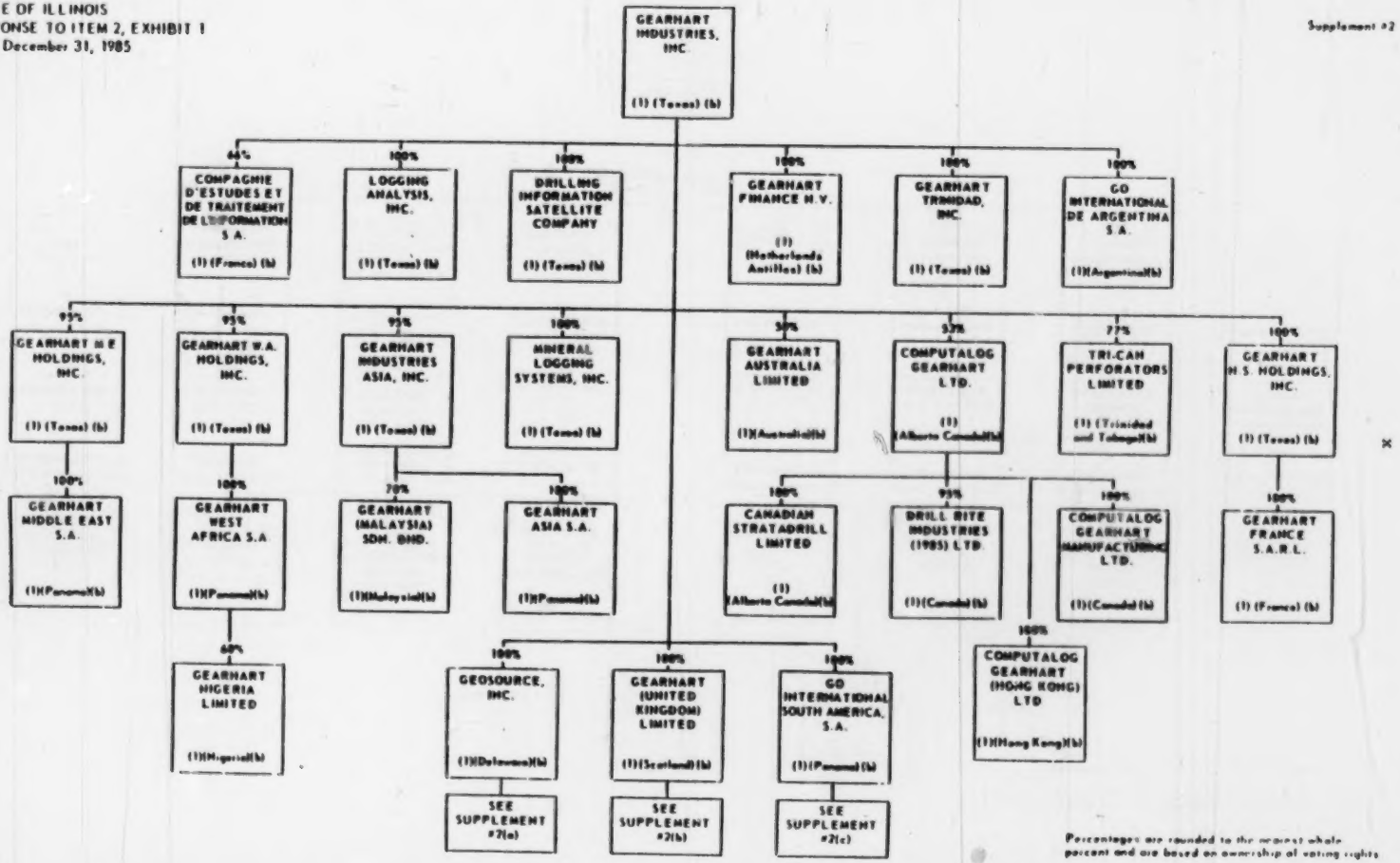


*Formerly American Independent Reinsurance Company

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

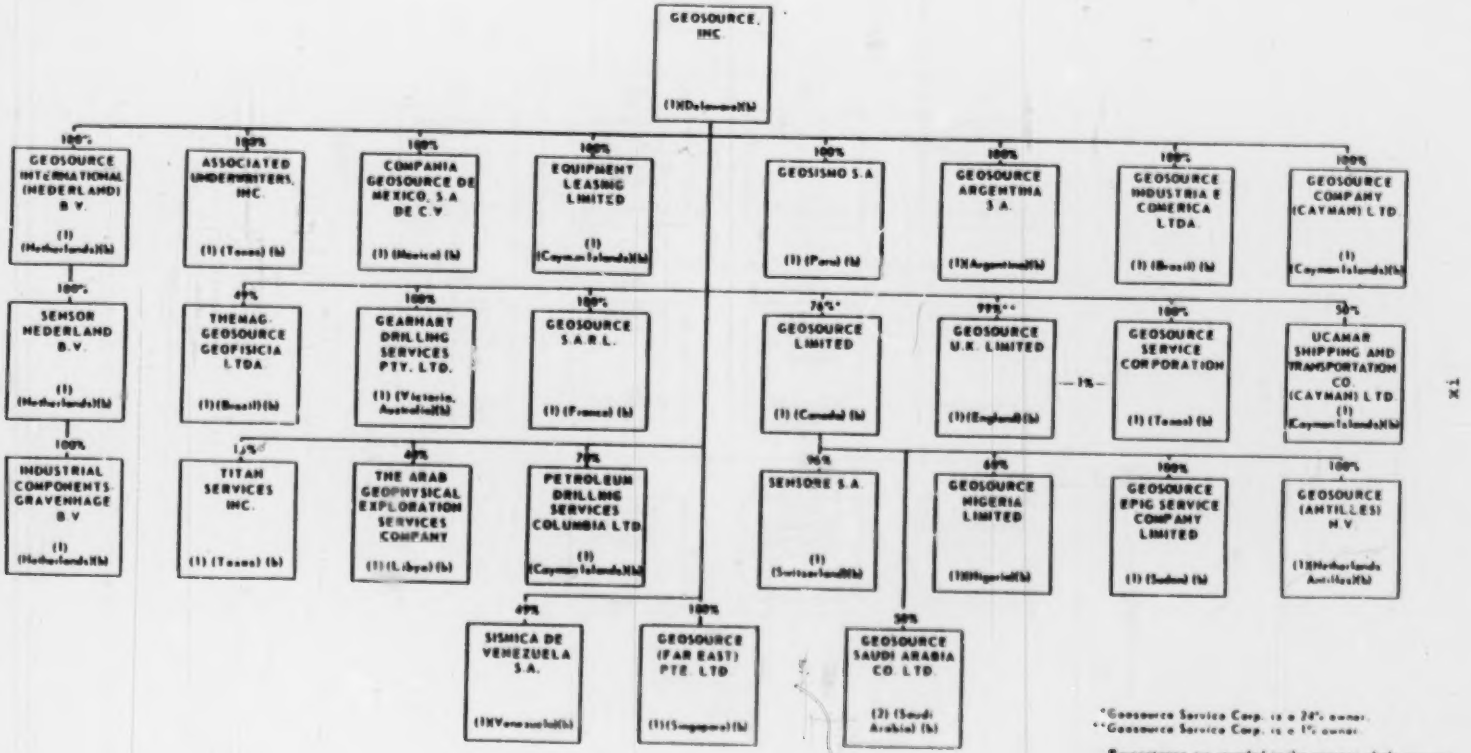
Supplement #2



Percentages are rounded to the nearest whole percent and are based on ownership of voting rights

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #2(a)

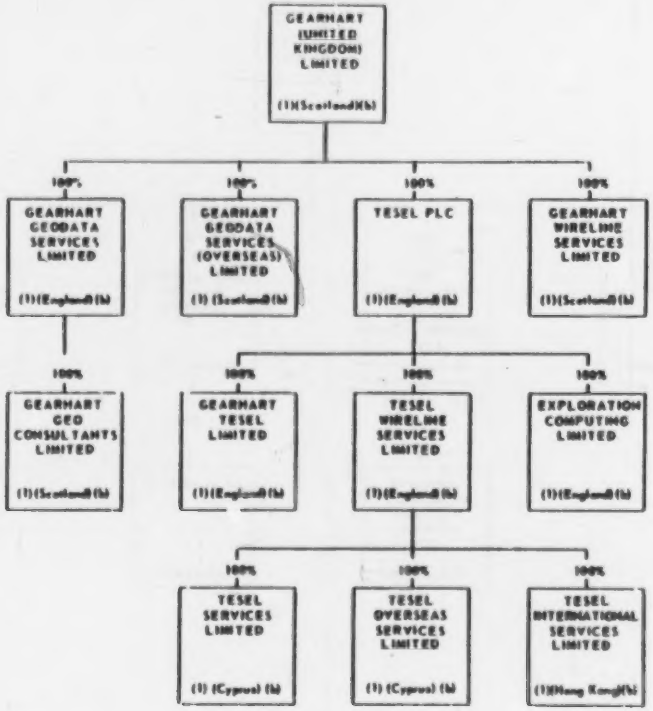


*Geosource Service Corp. is a 24% owner.
**Geosource Service Corp. is a 1% owner.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

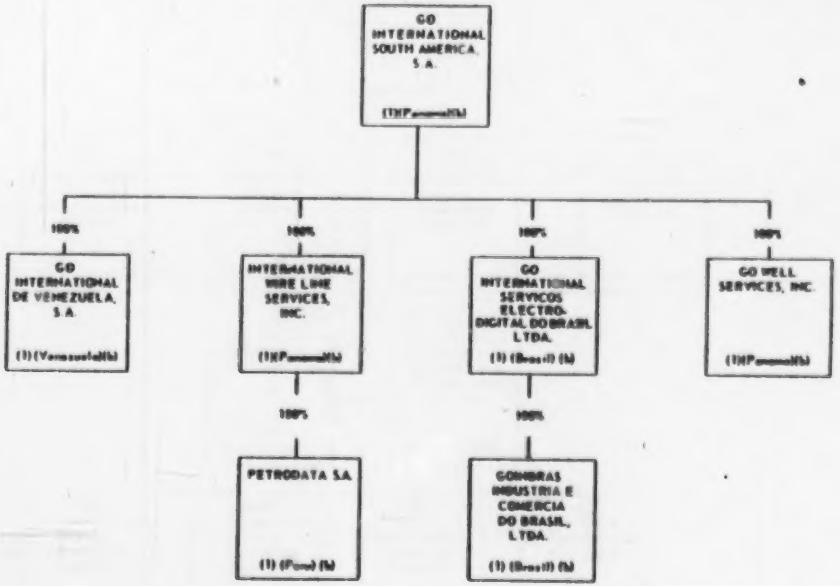
STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #2(b)



Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985


GO INTERNATIONAL SOUTH AMERICA, S.A.
100%
GO INTERNATIONAL DE VENEZUELA, S.A.
INTERNATIONAL WIRE LINE SERVICES, INC.
GO INTERNATIONAL SERVICOS ELECTRO-DIGITAL DO BRASIL LTDA.
GO WELL SERVICES, INC.
PETRODATA S.A.
GOMBRAS INDUSTRIA E COMERCIA DO BRASIL, LTDA.

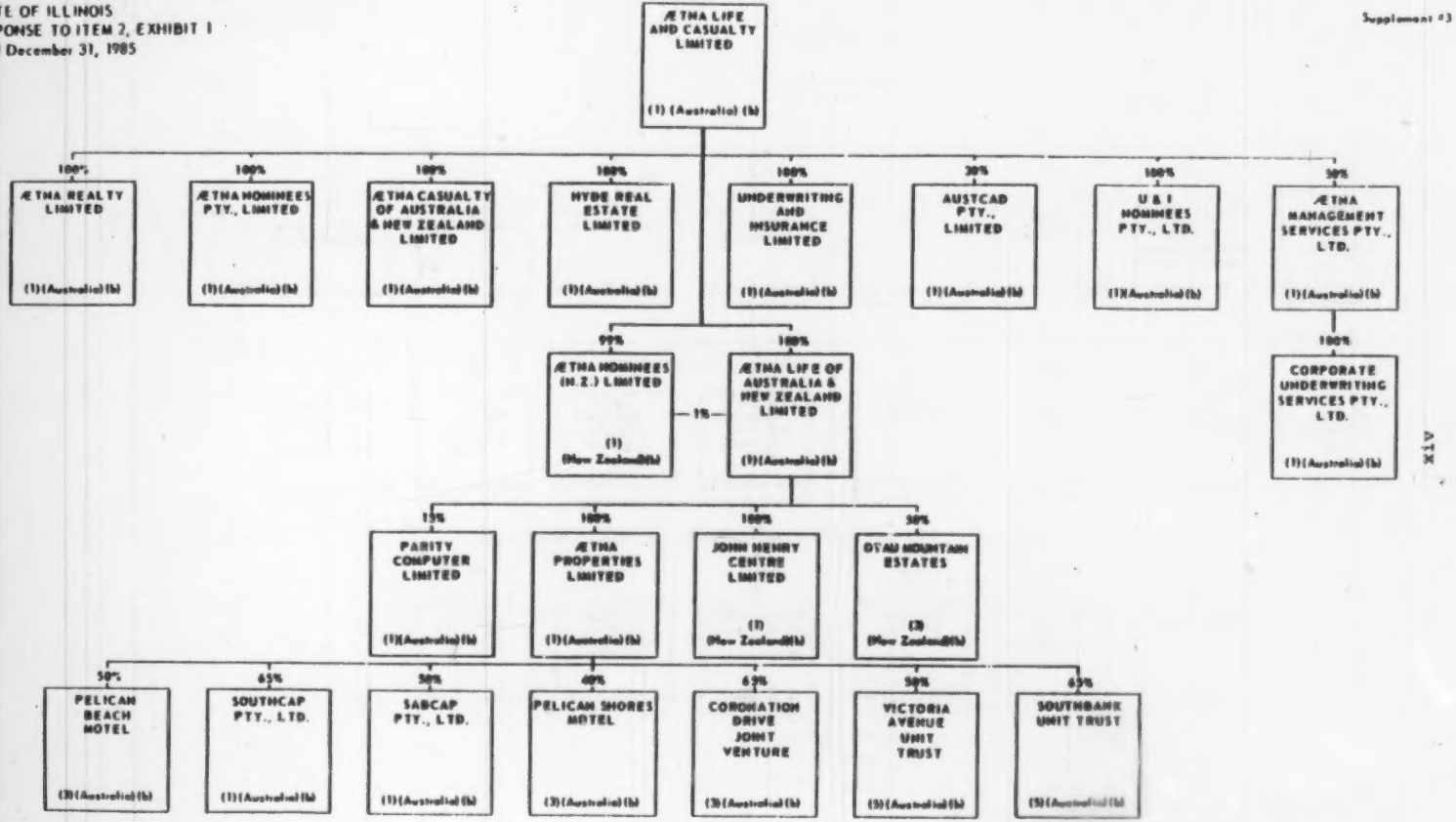
Supplement #2(c)

xiii

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

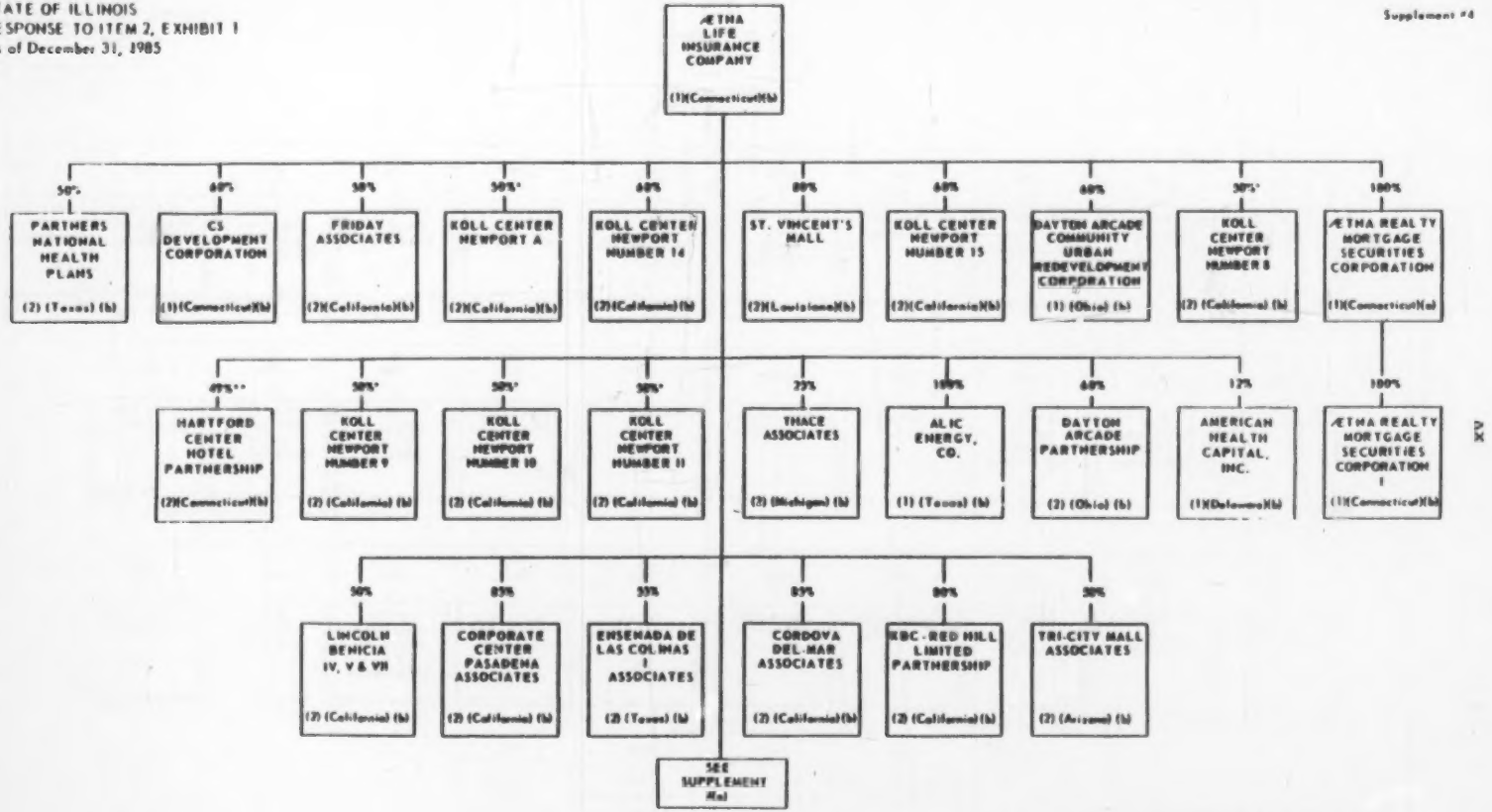
Supplement #3



Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #4



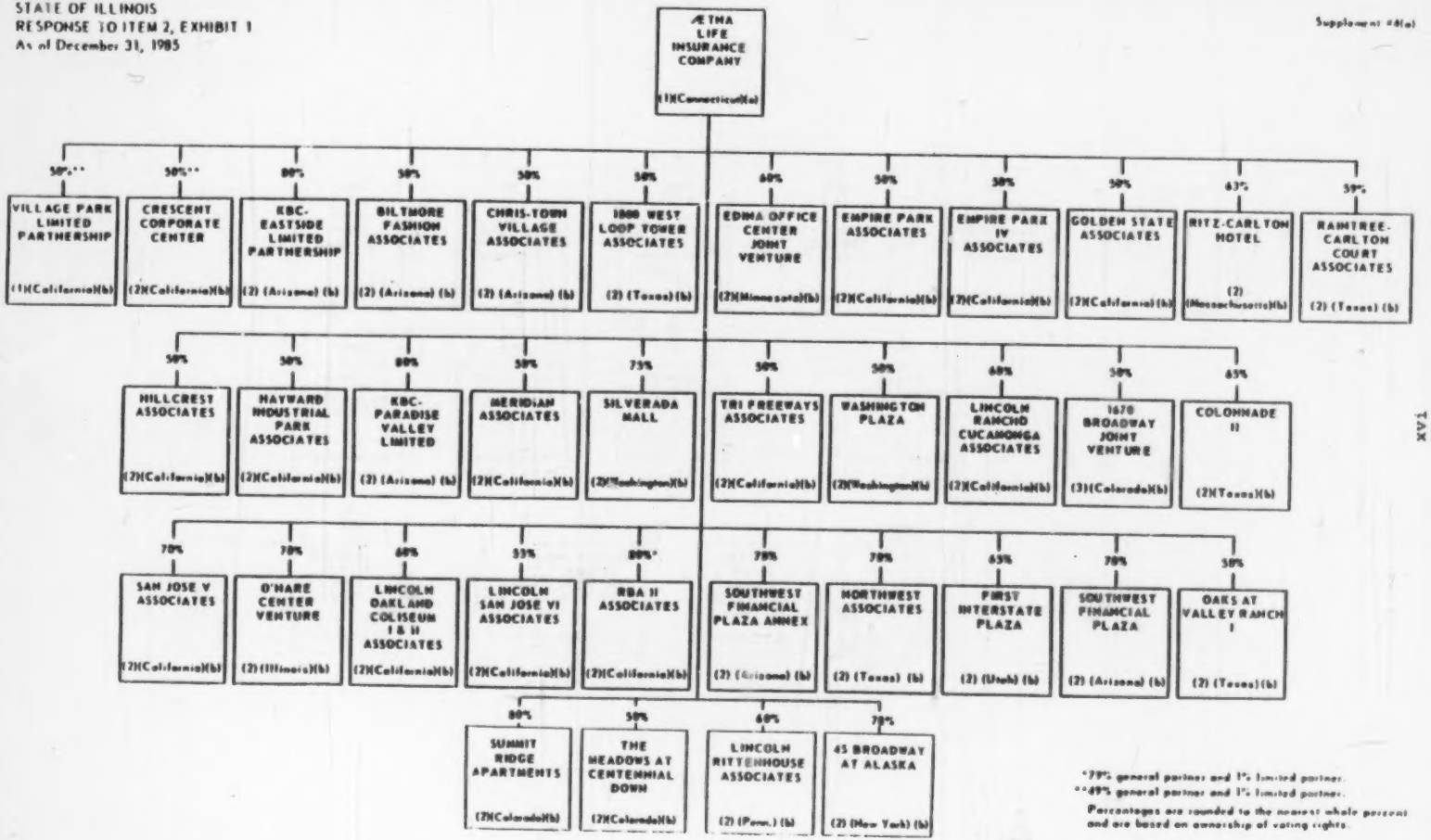
XV

* Ætna Life Insurance Company is a 49% general partner and 1% limited partner.
** Ætna Life and Casualty Company is a 1% general partner.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #4(a)


ÆTNA LIFE INSURANCE COMPANY
(1)(Connecticut)(a)
50%** VILLAGE PARK LIMITED PARTNERSHIP (1)(California)(b)
50%** CRESCENT CORPORATE CENTER (2)(California)(b)
80% KBC-EASTSIDE LIMITED PARTNERSHIP (2) (Arizona) (b)
50% BILTMORE FASHION ASSOCIATES (2) (Arizona) (b)
50% CHRIS-TOWN VILLAGE ASSOCIATES (2) (Arizona) (b)
50% 1800 WEST LOOP TOWER ASSOCIATES (2) (Texas) (b)
60% EDINA OFFICE CENTER JOINT VENTURE (2)(Minnesota)(b)
50% EMPIRE PARK ASSOCIATES (2)(California)(b)
50% EMPIRE PARK IV ASSOCIATES (2)(California)(b)
50% GOLDEN STATE ASSOCIATES (2)(California)(b)
63% RITZ-CARLTON HOTEL (2) (Massachusetts)(b)
59% RAMTREE-CARLTON COURT ASSOCIATES (2) (Texas) (b)
50% HILLCREST ASSOCIATES (2)(California)(b)
50% HAYWARD INDUSTRIAL PARK ASSOCIATES (2)(California)(b)
80% KBC-PARADISE VALLEY LIMITED (2) (Arizona) (b)
50% MERIDIAN ASSOCIATES (2)(California)(b)
75% SILVERADA MALL (2)(Washington)(b)
50% TRI FREEWAYS ASSOCIATES (2)(California)(b)
50% WASHINGTON PLAZA (2)(Washington)(b)
68% LINCOLN RANCHO CUCAMONGA ASSOCIATES (2)(California)(b)
50% 1670 BROADWAY JOINT VENTURE (3)(Colorado)(b)
65% COLONNADE II (2)(Texas)(b)
70% SAN JOSE V ASSOCIATES (2)(California)(b)
70% O'HARE CENTER VENTURE (2) (Illinois)(b)
68% LINCOLN OAKLAND COLISEUM I & II ASSOCIATES (2)(California)(b)
55% LINCOLN SAN JOSE VI ASSOCIATES (2)(California)(b)
80%* RBA II ASSOCIATES (2)(California)(b)
70% SOUTHWEST FINANCIAL PLAZA ANNEX (2) (Arizona) (b)
70% NORTHWEST ASSOCIATES (2) (Texas) (b)
65% FIRST INTERSTATE PLAZA (2) (Utah) (b)
70% SOUTHWEST FINANCIAL PLAZA (2) (Arizona) (b)
50% OAKS AT VALLEY RANCH I (2) (Texas) (b)
80% SUMMIT RIDGE APARTMENTS (2)(Colorado)(b)
50% THE MEADOWS AT CENTENNIAL DOWN (2)(Colorado)(b)
60% LINCOLN RITTENHOUSE ASSOCIATES (2) (Penn.) (b)
70% 45 BROADWAY AT ALASKA (2) (New York) (b)

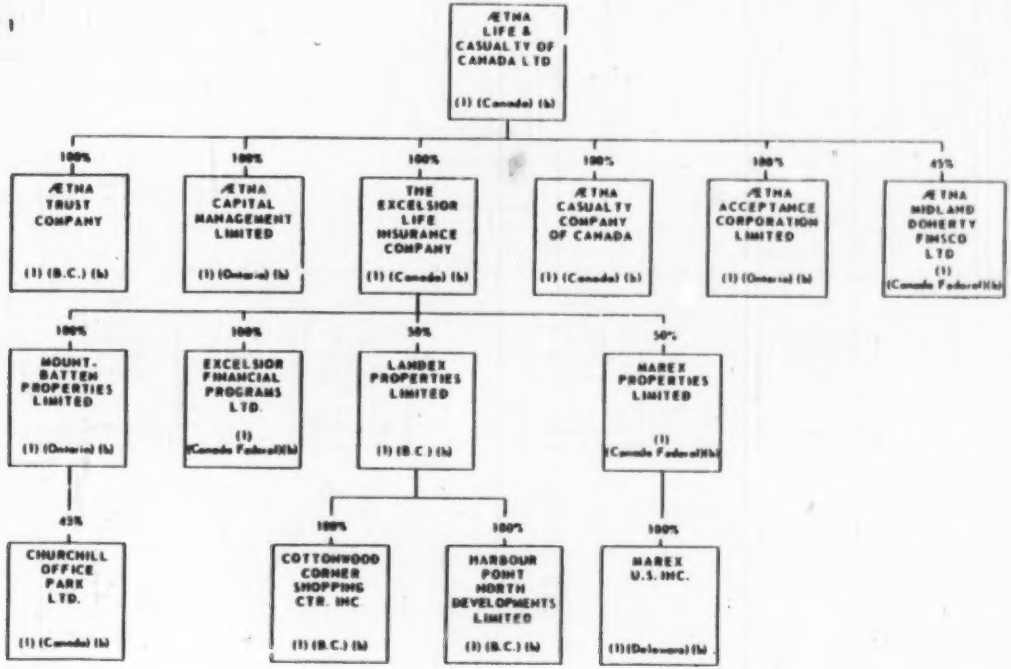
*79% general partner and 1% limited partner.
**49% general partner and 1% limited partner.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

XVI

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

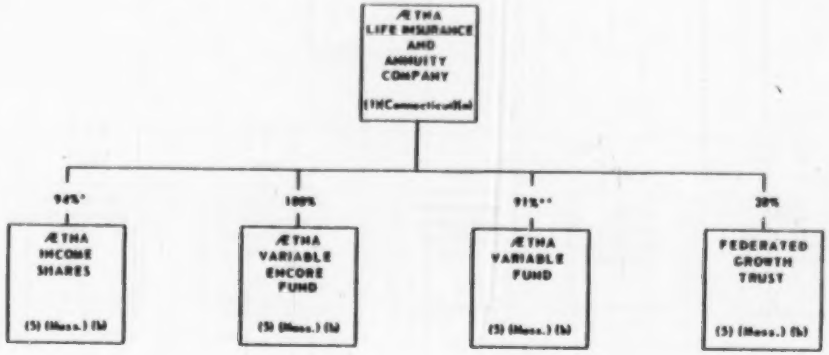
Supplement #5



Percentages are rounded to the nearest whole percent and are based on ownership of voting rights

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement 06



*The Ætna Casualty and Surety Company owns 1% of the total outstanding stock of Ætna Income Shares.
**Ætna Life Insurance Company owns 8% of the total outstanding stock of Ætna Variable Fund.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

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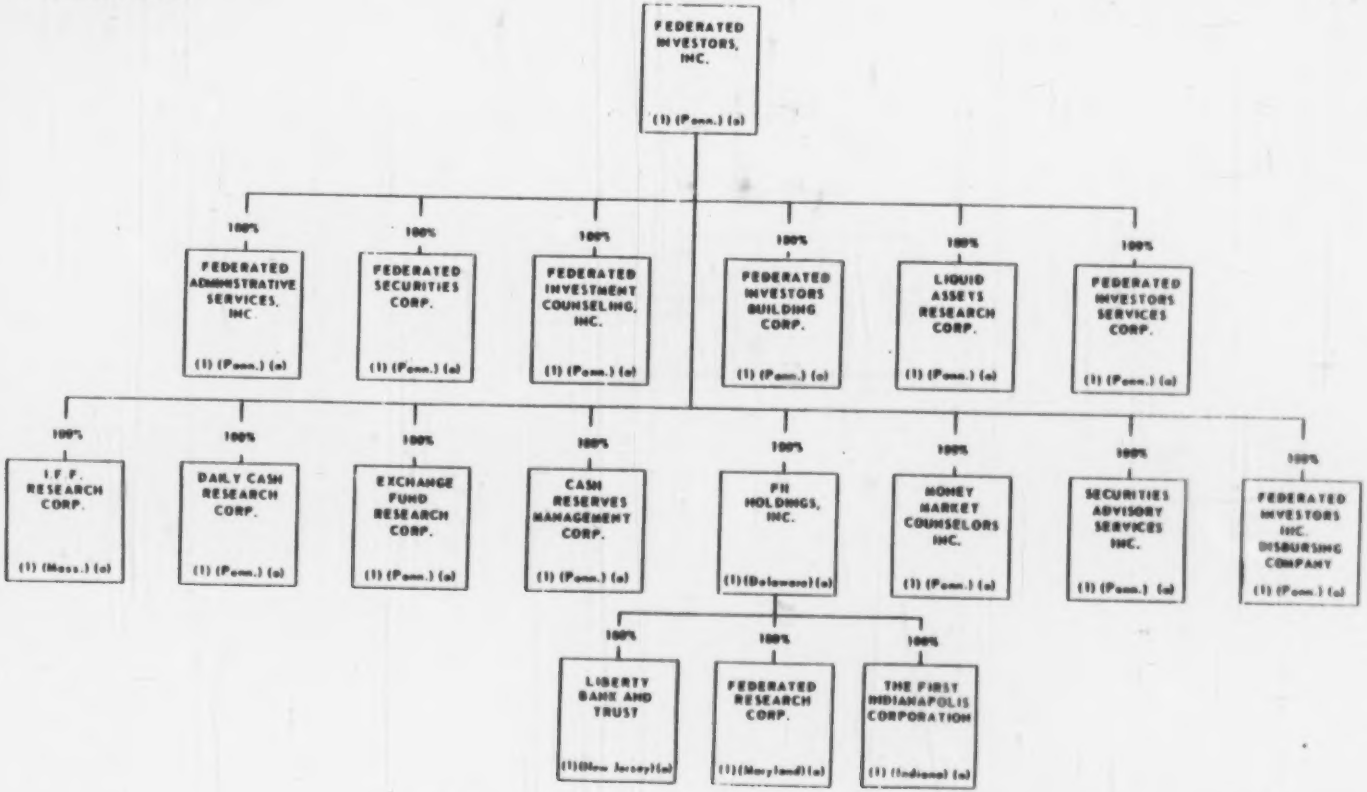
STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

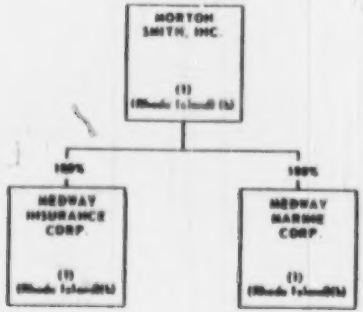
Supplement #7



Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #2

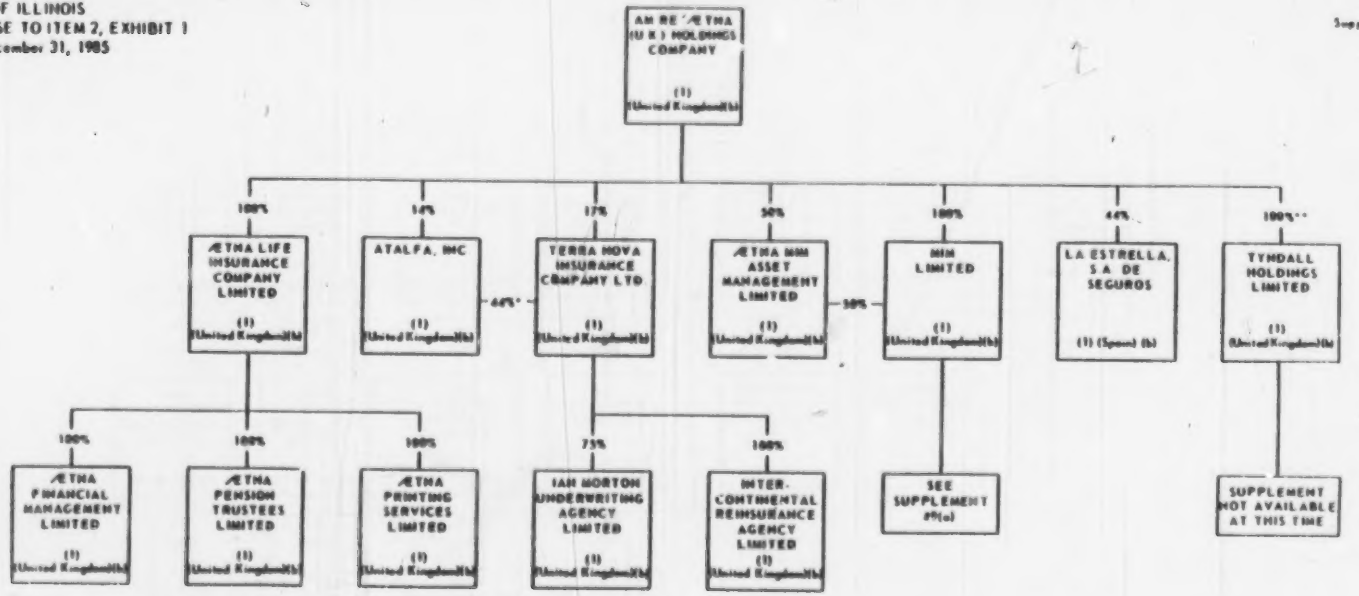


XX

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #9



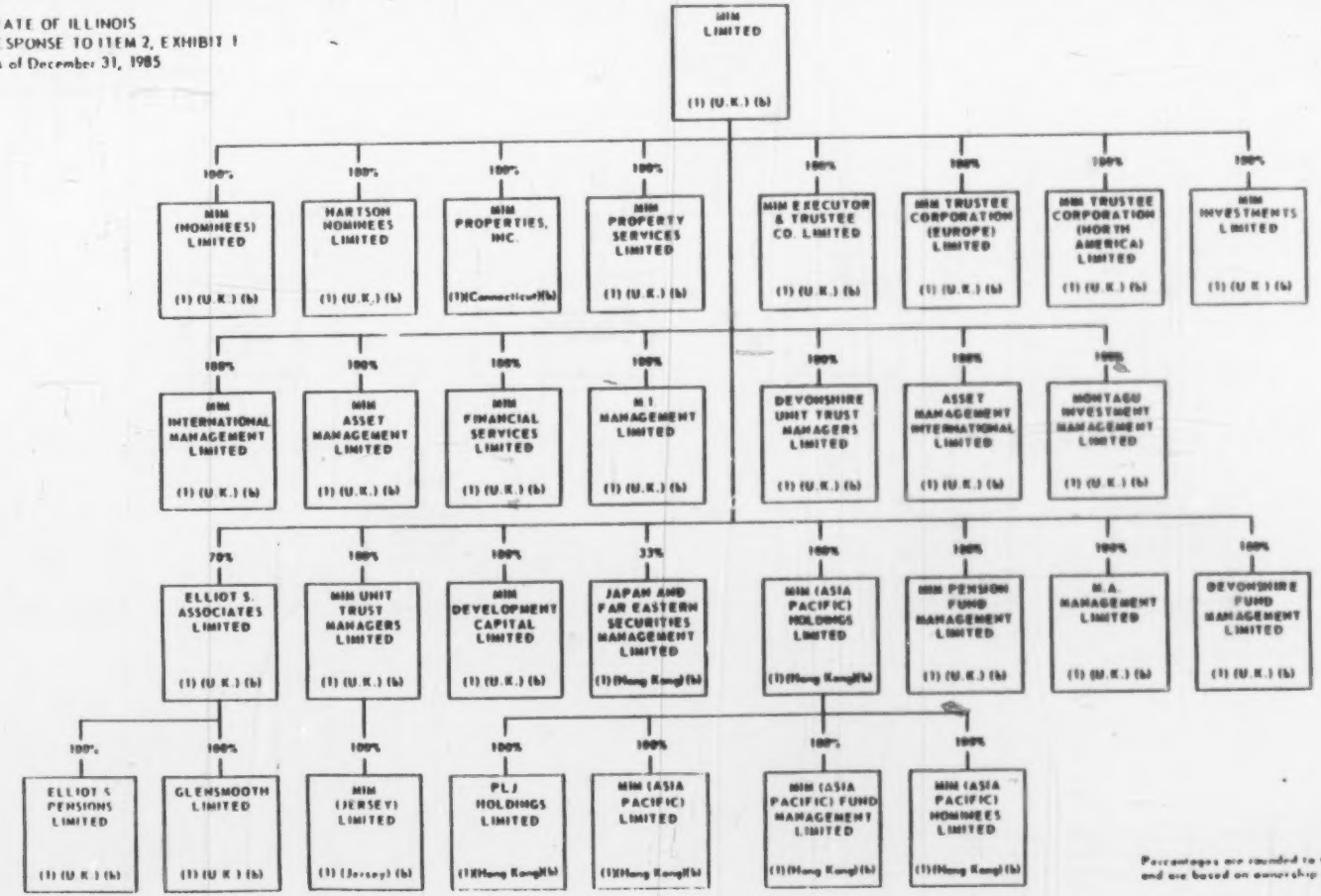
XXX

*ATALFA, Inc. owns 44% of Terra Nova Insurance Company, Ltd.
** Acquired February 10, 1986.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

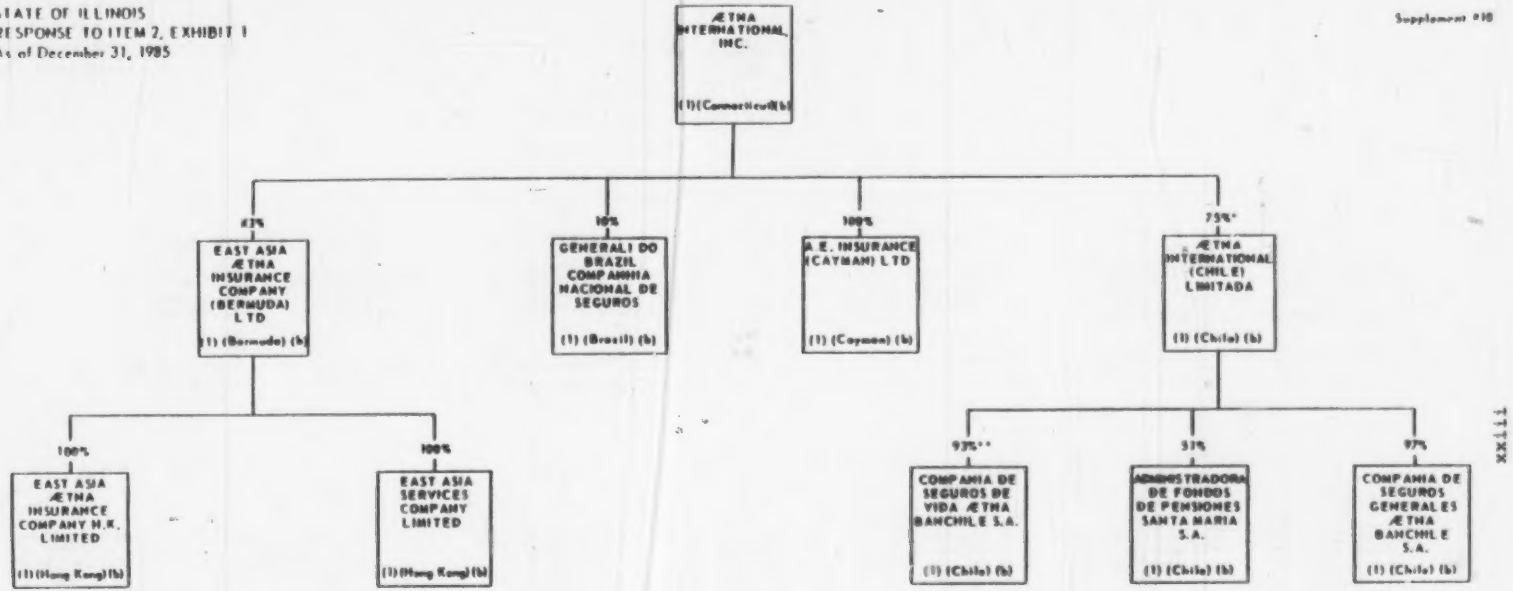
Supplement 99(a)


MIM LIMITED
(1) (U.K.) (b)
100% MIM (NOMINEES) LIMITED (1) (U.K.) (b)
100% HARTSON NOMINEES LIMITED (1) (U.K.) (b)
100% MIM PROPERTIES, INC. (1)(Connecticut)(b)
100% MIM PROPERTY SERVICES LIMITED (1) (U.K.) (b)
100% MIM EXECUTOR & TRUSTEE CO. LIMITED (1) (U.K.) (b)
100% MIM TRUSTEE CORPORATION (EUROPE) LIMITED (1) (U.K.) (b)
100% MIM TRUSTEE CORPORATION (NORTH AMERICA) LIMITED (1) (U.K.) (b)
100% MIM INVESTMENTS LIMITED (1) (U.K.) (b)
100% MIM INTERNATIONAL MANAGEMENT LIMITED (1) (U.K.) (b)
100% MIM ASSET MANAGEMENT LIMITED (1) (U.K.) (b)
100% MIM FINANCIAL SERVICES LIMITED (1) (U.K.) (b)
100% M I MANAGEMENT LIMITED (1) (U.K.) (b)
100% DEVONSHIRE UNIT TRUST MANAGERS LIMITED (1) (U.K.) (b)
100% ASSET MANAGEMENT INTERNATIONAL LIMITED (1) (U.K.) (b)
100% MONTAGU INVESTMENT MANAGEMENT LIMITED (1) (U.K.) (b)
70% ELLIOT S. ASSOCIATES LIMITED (1) (U.K.) (b)
100% MIM UNIT TRUST MANAGERS LIMITED (1) (U.K.) (b)
100% MIM DEVELOPMENT CAPITAL LIMITED (1) (U.K.) (b)
33% JAPAN AND FAR EASTERN SECURITIES MANAGEMENT LIMITED (1)(Hong Kong)(b)
100% MIM (ASIA PACIFIC) HOLDINGS LIMITED (1)(Hong Kong)(b)
100% MIM PENSION FUND MANAGEMENT LIMITED (1) (U.K.) (b)
100% M.A. MANAGEMENT LIMITED (1) (U.K.) (b)
100% DEVONSHIRE FUND MANAGEMENT LIMITED (1) (U.K.) (b)
100% ELLIOT S PENSIONS LIMITED (1) (U.K.) (b)
100% GLENSMOOTH LIMITED (1) (U.K.) (b)
100% MIM (JERSEY) LIMITED (1) (Jersey) (b)
100% PLJ HOLDINGS LIMITED (1)(Hong Kong)(b)
100% MIM (ASIA PACIFIC) LIMITED (1)(Hong Kong)(b)
100% MIM (ASIA PACIFIC) FUND MANAGEMENT LIMITED (1)(Hong Kong)(b)
100% MIM (ASIA PACIFIC) NOMINEES LIMITED (1)(Hong Kong)(b)

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #10

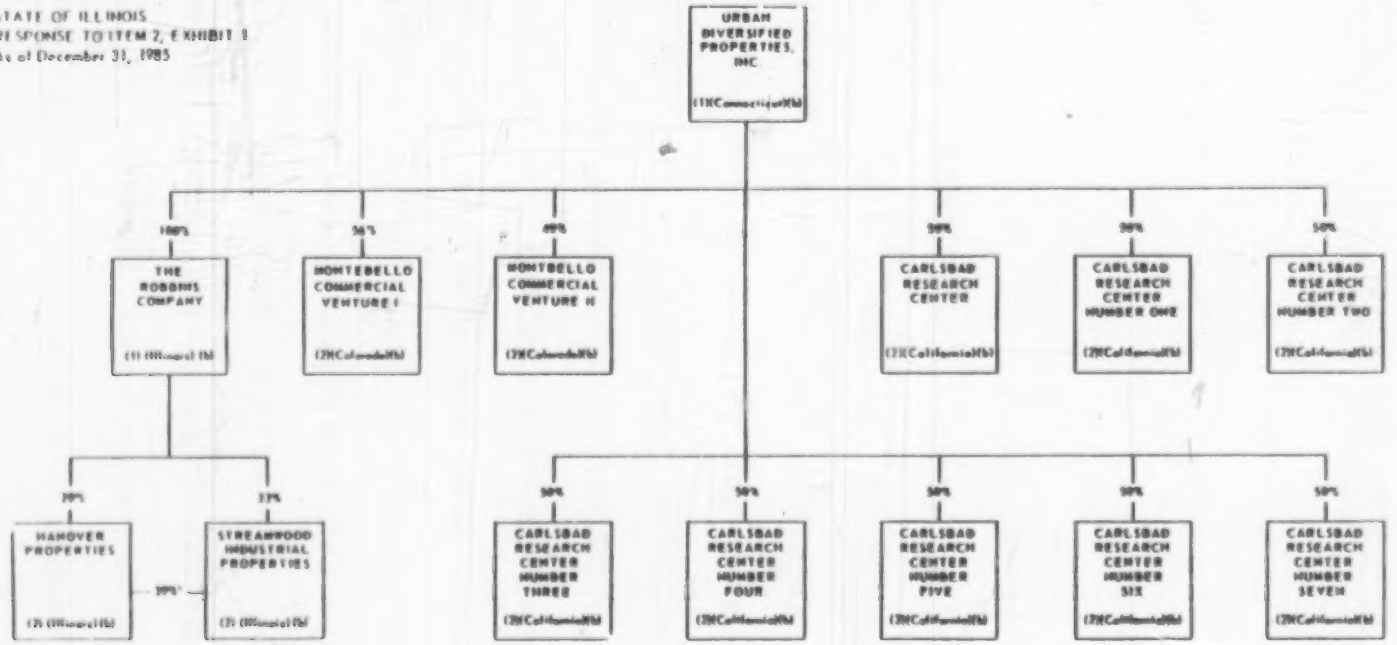


11138

*Ætna Life and Casualty Company owns 25% of this limited liability association.
**Ætna Life and Casualty Company owns 6% and Ætna International, Inc. owns 1%.
Percentages are rounded to the nearest whole percentage, and are based on voting rights.

STATE OF ILLINOIS
RESPONSE TO ITEM 2, EXHIBIT 1
As of December 31, 1985

Supplement #11



*Streamwood Industrial Properties owns 20% of Hanover Properties.

Percentages are rounded to the nearest whole percent and are based on ownership of voting rights.

PRELIMINARY STATEMENT

Defendant Aetna Casualty and Surety Company (Aetna) recognizes petitioner's dissatisfaction with the opinion of the District Court.[1] However, Aetna contends that in the questions presented in her petition, she has misconstrued the opinion of the District Court. For example, in question 1 she asserts that the District Court expressly found Aetna's policy to be ambiguous. The District Court awarded petitioner uninsured motorist coverage in the minimum statutory amount for failure by Mr. Berry to reject in writing the uninsured motorist coverage mentioned in the rider. The District Court found the extent of the coverage to be ambiguous:

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[1] Berry v. Aetna Casualty and Surety Company, et al, 607 F. Supp. 397 (S.D. Miss., 1985)

***

> Additionally, the extent of uninsured motorist coverage is ambiguous since. . .[2]
>
> (emphasis added)

***

Aetna will address questions 2 and 3 in its brief, however, the Mississippi Supreme Court has never held that uninsured motorist coverage can be aggregated, or "stacked" in all cases including this one.

Statement of the Case

For purposes of this litigation, Aetna does not contest plaintiff's charactarization of the circumstances leading to the accident and death of H. H. Berry.

Aetna has searched its policy in vain for any language providing uninsured motorist coverage for "all owned cars" as represented by petitioner at page 10 of her petition. A cursory review of the declarations shows that

---

[2]607 F. Issue pp at 398

uninsured motorist coverage is provided by the policy in the amount of $25,000.00 per accident. The reverse side of the declarations further describes the uninsured motorist coverage:

> ***
>
> 22=OWNED AUTOS ONLY. Only those autos you own (and for Liability Coverage any trailers you don't own while attached to power units you own). This includes those autos you acquire ownership of after the policy begins.[3]
>
> ***

In any event, it is not contended by petitioner that Mr. Berry met his death in a "owned automobile." Petitioner mentions the C A 9910 endorsement and that Mr. Berry is named on the endorsement. She neglects the language contained in the endorsement:

> ***
>
> This endorsement changes only those coverages listed below for which a charge is shown below. Each of those coverages is changed as follows:[4]
>
> ***

---

[3] Record, p. 297.

[4] Record, p. 379.

No charge is shown for uninsured motorist coverage. Neither is a charge shown for physical damage insurance.

Jack Berry did not reject the uninsured motorist coverage in writing and the District Court held that he was entitled to the statutory coverage only for that reason. Aetna contended in the District Court that only the named insured, Berry-Pontiac-GMC, Inc., could reject the coverage. This argument was rejected. The district Court did not find that the Berrys were insured under the endorsement as petitioner claims but that Mr. Berry only was entitle to coverage in the minimum statutory amount for failure to reject the uninsured motorist coverage in writing. That rationale was adopted and affirmed by the Fifth Circuit Court of Appeals.

THE WRIT SHOULD BE DENIED.

Petitioner seeks certiorari invoking Title 28, USC, Section 1254 and assigns as questions for review whether the District Court and Fifth Circuit Court of Appeals properly construed an insurance contract. Recognizing that Rule 17 of the Supreme Court does not fully measure the Court's discretion in whether or not to grant review on writ of certiorari, comparing petitioner's contentions with the aforesaid rule indicates that petitioner contends that the District Court has so far departed from the acceptable and usual course of judicial proceedings or that the Fifth Circuit Court of Appeals has sanctioned such a departure by the District Court that this Court's power of supervision should be exercised. She has not alleged a conflict among the federal courts of appeals. Indeed, the federal courts of appeals which have

passed on the question are in accord that one who is neither a named insured under a policy nor a designated insured under that policy cannot aggregate uninsured motorist coverages under a fleet policy.[5]

She tells this Court that the District Court expressly found ambiguity and yet construed the policy against her in face of the language of the District Court's opinion finding ambiguity only in the extent of the coverage which the District Court held applicable for failure of Berry to reject the coverage in writing and expressly construing the ambiguity in favor of Berry:

> ***
> This ambiguity in the policy must be construed in favor of the insured and, for this reason also, Berry is entitled to statutory coverage. (Citations omitted.)[6]
> ***

---

[5] Fuqua vs Travelers Insurance Company, 734 F. 2D 616 (11th Cir. 1984).

[6] 607 F. Issue pp. at 398.

Citing Government Employees Insurance Company vs. Brown,[7] petitioner contends that the District Court and Fifth Circuit Court of Appeals should have, but failed to apply that case to the facts of this one.

GEICO v. Brown, supra, does not apply for the reason that the Browns were the named insures under the GEICO policy. In the case sub judice, the District Court found and the Fifth Circuit agreed that Berry was not a first class insured since the named insured was a corporation, Berry-Pontiac-GMC, Inc. Moreover, the Mississippi Court awarded the Browns coverage under the CEICO policy. The District Court awarded Berry statutory coverage only in accordance with the statute.

There is no construction of the contract. Berry was not insured under the contract. Since the insurance contract does not apply in the first instance, coverage cannot be aggregated.

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[7]446 So. 2D 1002 (Miss. 1984)

Question I.

Petitioner roughly traces the history of the pleadings in an effort to show ambiguity in Aetna's position in the litigation. Aetna has always asserted that Jack Berry was an insured under the policy, but only for certain coverages. In its Motion for Summary Judgement, Aetna urged that Jack Berry was not covered under the policy's uninsured motorist's provisions because he was not the named insured nor was he occupying a vehicle to which the policy applied at the time of the accident. The District Court agreed but held only that Berry was entitled to statutory coverage.

Now, petitioner contends that she too is a named insured either under the policy or endorsement. Since neither the policy nor endorsement applies, she is not entitled to policy or statutory coverage.

In the alternative, petitioner contends that the District Court wrongly applied the

Mississippi statute and that a minimum of $10,000.00/$20,000.00 coverage is applicable.

This position was not taken at the hearing before the magistrate for report and recommendation to the United States District Judge. It was not presented to the District Court whether by the cross Motions for Summary Judgement, Petition for Rehearing, or Rule 60, Federal Rules of Civil Procedure. It was not assigned nor argued on appeal and not raised in the Petition for Rehearing following appeal. The point is waived.[8]

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[8] Pittsburgh Towing Company vs. Mississippi Valley Barge Line Company, et al, 385 U.S. 32, 17 L ed 2nd 31, 87 S. Ct. 195, reh. den. 385 U.S. 995, 17 L ed 2nd 455, 87 S. Ct. 594 (U.S. 1966), Singleton vs. Wulff, et al, 428 U.S. 106, 49 L Ed 2nd 826, 96 S. Ct. 2868 (U.S. 1976), Youakim, et al vs. Miller, 425 U.S. 231, 47 L Ed 2nd 701, 96 S. Ct. 1399 (U.S. 1976), Alabama Great Southern Railroad Company vs. Allied Chemical Corporation, et al, 501 F. 2D 94 (5th Cir. 1974).

Conclusion.

This petition should be denied. This is clearly a case of private litigation. While arguably within the contemplation of Rule 17, Supreme Court Rules, it is not addressed by the rule. It is not a case of general public importance nor is there discord among the federal circuits. Moreover, the decision of the courts below was substantially correct.

RESPECTFULLY SUBMITTED, this the ____ day of September, 1986.

AETNA CASUALTY AND SURETY COMPANY,
Defendant

By: _____
OF COUNSEL TO DEFENDANT

JIM BULLOCK
SHELL, BUFORD, BUFKIN,
CALLICUTT & PERRY
Post Office Box 157
552 Trustmark Building
Jackson, Mississippi 39205
Telephone: (601) 948-2291

CERTIFICATE OF SERVICE

I, **JIM BULLOCK**, of counsel to the defendant, Aetna Casualty and Surety Company, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief In Opposition to Petition for Writ of Certiorari to the following counsel of record:

Roland C. Lewis, Esquire
Post Office Box 1695
Jackson, Mississippi 39215-1695

Robert T. Gordon, Esquire
Heidelberg, Woodliff and Franks
Suite 1400
Capitol Towers Building
Jackson, Mississippi 39201

Jim Kitchens, Esquire
Constance Johnson, Esquire
Kitchens and Pickard
Post Office Box 310
Hazlehurst, Mississippi 39083

THIS the __ day of September, 1986.

JIM BULLOCK

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1986

MRS. CHERRY BERRY, GENERAL GUARDIAN FOR THE USE AND BENEFIT OF SANDY BERRY, CHRISTY BERRY, AND AMANDA BERRY, MINORS, AND MRS. CHERRY BERRY, INDIVIDUALLY AND FOR THE USE AND BENEFIT OF ALL ENTITLED — PETITIONERS

VS — NO. 86-338

THE AETNA CASUALTY AND SURETY COMPANY — RESPONDANT

STATEMENT OF MAILING

STATE OF MISSISSIPPI

COUNTY OF HINDS

PERSONALLY APPEARED BEFORE ME, the undersigned authority for the above county and state, **JIM BULLOCK,** who, after being by me first duly sworn, stated on oath that he is a member of the bar of the Supreme Court of the United States of America, and that the original and forty (40) copies of the Brief in Opposition to the Writ of Certiorari, in

the case of Berry vs. Aetna Casualty and Surety Company, were mailed to the Clerk of the United States Supreme Court, via the United States Postal Service, First Class, postage prepaid, on the _____ day of September, 1986.

Affiant further states that the mailing took place as to his own personal knowledge on said date.

_____
JIM BULLOCK

SWORN TO AND SUBSCRIBED BEFORE ME, this the ___ day of September, 1986.

_____
NOTARY PUBLIC

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I, **JIM BULLOCK**, of counsel for the above and foregoing Aetna Casualty and Surety Company, being a member of the bar of the Supreme Court of the United States of America, do hereby certify that I have, this date, forwarded by the United States Postal Service, postage prepaid, the original plus one copy of the above and foregoing Statement of Mailing to the clerk of this Court for filing in this Cause, and have forwarded a true and correct copy of the same to the following counsel of record:

Roland C. Lewis, Esquire
Post Office Box 1695
Jackson, Mississippi 39215-1695

Robert T. Gordon, Esquire
Heidelberg, Woodliff and Franks
Suite 1400
Capitol Towers Building
Jackson, Mississippi 39201

Jim Kitchens, Esquire
Constance Johnson, Esquire
Kitchens and Pickard
Post Office Box 310
Hazlehurst, Mississippi 39083

THIS the __ day of September, 1986.

JIM BULLOCK

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